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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 635

IRVING D. FRIEDMAN and SYLVIA FRIEDMAN, on behalf of themselves and in a representative capacity on behalf of all other owners and/or holders of Baltimore and Ohio convertible 4½% income bonds due February 1st, 2010,

Petitioners,

—versus—

CHESAPEAKE AND OHIO RAILWAY COMPANY

and

BALTIMORE AND OHIO RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

—against—

CHESAPEAKE AND OHIO RAILWAY COMPANY and BALTIMORE AND OHIO RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, above named, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case June 4, 1968.

Opinions Below

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra,* is reported in 395 F. 2d 663. The opinion of the United States District Court for the Southern District of New York, printed in Appendix B hereto, *infra,* is reported in 261 F. Supp. 728.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered June 4, 1968 (Appendix C hereto, *infra*). The time for filing this petition for certiorari has been extended, by order of Mr. Justice Harlan, to October 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

Petitioners, as B & O bondholders, brought this class suit in 1966 against both B & O and C & O claiming accumulated unpaid interest, and principal (accelerated). In 1962 C & O had received ICC authorization to "control" B & O with incidents of "control" so comprehensive as to amount to what petitioners claim effected a practical merger or consolidation of the two railroads. It is undisputed that with ICC permission or non-interference C & O has acquired ninety per cent of B & O's stock and has gone on to create a practical unification of operations and finances of the two railroads, including a saturational nationwide "public image" program depicting "C & O/B & O" as a unified-enterprise "partnership". Petitioners uncontradictedly alleged in this suit that since C & O's "control" regime there had been payment by C & O of dividends on "C & O" stock while B & O bond interest remained in arrears, failure to make certain B & O sinking fund payments, and the making of certain

deposits for retirement funds, all of which, petitioners claimed, caused maturing of the principal of the bonds under the terms of the bond indenture. Petitioners' claim for the interest arrears as such was paid while the appeal was pending in the Court below (May 1, 1968). But petitioners' claim for accelerated payment of the principal of the bonds remains unsatisfied. The Court of Appeals affirmed the District Court's summary judgment dismissing petitioners' complaint and an order of the District Court denying leave to amend the complaint. By both of the Courts below petitioners were held barred from suing by a "no action" provision of the bond indenture allegedly giving the trustee exclusive right to sue unless requested to do so by holders of twenty-five per cent of the bonds. It was also held that even if the "no action" bar is inapplicable, petitioners had no cause of action because the "control" authorized by the ICC did not allow, and had not resulted in, assumption by C & O of the instant bond obligations of B & O. The questions are:

1. Arising as this case does in the setting of the current unprecedented giant railroad mergers, and the intricate problems of statutory and constitutional policy presented to the Courts by this historic movement being still but in a relatively early stage of judicial evolution (cf. *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372; *Penn-Central Merger And N & W Inclusion Cases*, 389 U. S. 486, should not the claims of the present petitioners as aggrieved bondholders in what was the very first of this recent series of prodigious railroad combinations—the instant C & O-B & O combination having evoked in 1962 the initiating major decisional guidelines of the ICC for this new field—be taken up now by this Court on certiorari as presenting a prime test case for authoritative guideline declaration to alleviate at

least in part the justice-troubling fictions which are inherent in claimed distinctions between corporate "merger" and corporate "control", and which have thus far in this case prevailed to deprive petitioners of even so much as a fact-triably meaningful day in court?

2. In the overall circumstances of this case does the applying of the "no action" provision of the bond indenture violate Congressional policy in carrying out railroad combinations, and does it violate petitioners' federally protected contract rights and their constitutional rights of due process, equal protection and protection against "taking" of their property without just compensation? (Petitioners did not expressly formulate these constitutional contentions below, but the constitutional points in this question 2 and in subsequent questions are believed to be fairly raised by the pleadings.)

3. Supplementing or varying our above questions, was it error to dismiss petitioners' complaint and to deny them leave to amend their complaint, i.e., was it error to bar petitioners on the indenture-based technical "no action" ground and/or alternatively to reject summarily petitioners' contentions (concerning C & O's obligations) as failing to state a cause of action, without explicit and thorough consideration of the overall constitutional, Congressional and ICC perspectives of the entirety of the contemporary railroad unification developments in which the C & O-B & O combination happens to have been the *initiating* and prime policy-shaping factor for the entire railroad-merger process of the current era (e.g., N & W-Nickel Plate, Penn-Central-New Haven)? (Petitioners contend that neither of the Courts below even remotely approached such an explicit and thorough consideration of those applicable policy perspectives, without which this case cannot be correctly decided.)

4. Further supplementing or varying our above questions, on a correct and *constitutional* application of the pertinent provisions of the Interstate Commerce Act in the light of the actual facts of the C & O-B & O combination vis-a-vis the B & O bondholders of the class represented by petitioners, and notwithstanding verbalizations by the ICC in its 1962 decision (317 I.C.C. 261) that the C & O-B & O "control" combination was not a "merger", are C & O and B & O answerable to petitioners in this suit on triable issues of fact with respect to petitioners' claims herein as aggrieved bondholders?

5. Further supplementing or varying our above questions, can administrative or statutory use of a formulary distinction between "control" and "merger", or can statutory provisions regulating assumption of railroad debts, constitutionally bring about (as here) the subjection of creditors (B & O bondholders) to a new *de facto* debtor (C & O) who is held nevertheless to have no legal responsibility to those creditors?

6. Was it error to throw petitioners out of Court without opportunity for a trial of issues of fact, in view of all of the foregoing, and in view also of the fact that undisputedly, during all times pertinent hereto, between twenty percent and twenty-five per cent of the B & O bonds of the issue here involved were held by one or the other of the two respondent railroads themselves, so that it was factually unrealistic and legally and equitably wrong to enforce against petitioners the indenture-based technical twenty-five per cent "no action" provision (this latter item was not formulated by petitioners in the Courts below but is believed to be fairly raised by the pleadings).

7. Even if C & O is not liable because the ICC did not expressly authorize assumption of B & O's obligations,

is not B & O itself nevertheless still liable, and was not dismissal of the complaint as to B & O therefore error?

8. Even if the "no action" clause bars suit against B & O, is it not inapplicable to the claims against C & O, especially the claims under the proposed amendments to the complaint (seeking recovery individually against C & O's officers as well as against the corporate defendants on federal statutory grounds and not on indenture-based grounds)?

9. Have the summary judgment procedures of Rule 56, F.R.C.P. been erroneously applied?

Constitutional Provisions and Statutes Involved

The case involves the Commerce Power (Art. I, §8), and the due process and just compensation clauses (Fifth Amendment) of the United States Constitution. It also involves 49 U.S.C. §§5(2), 5(4) to (9) inclusive, 5(11), 5(12), 8, 20a(2), and 20a(11). These statutory provisions are quoted in Appendix D hereof *infra*. The case also involes the summary judgment rule (Rule 56, F.R.C.P.), and Rule 15a (F.R.C.P.) relating to amendment of pleadings.

Statement of the Case*

Petitioners, owners of $200,000 face value of B & O 4½% convertible income bonds, commenced this class suit in the United States District Court for the Southern District of New York (complaint, 15a**) against the two respondent railroad companies (diversity of citizenship). The original complaint alleged four causes of action. The first cause of action alleged that C & O and B & O effected a merger in fact by reason of their combining the operations of both railroads into what they call a "C & O-B & O Partnership" (16a); and that by reason of said *de facto* merger the bond obligations of the B & O have now also become the obligations of the C & O. The indenture requires that any corporation merging with the B & O assume said bond obligations (80a-82a). Furthermore, C & O declared and paid a dividend of $9,000,000.00 in February and March of 1966, respectively, alleged to be in violation of the indenture because of the arrears of bond interest owing at the time (18a, 75a-77a). The second cause of action alleged that the bonds, which on their face are due and payable in the year 2010, have been accelerated and are now immediately due and payable by reason of said *de facto* merger and dividend payment. The third cause of

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* We are aware that under the new practice the certified record filed in this Court does not include printed appendices used in the Court below. However, the appellants' (the petitioners here) printed Appendix in the Court of Appeals was unusually complete; it contained all of the pleadings, and this case has turned thus far solely on the pleadings. We shall therefore refer to the pages of the printed Appendix in the Court below, as such will serve this Court's convenience in the event the Court should wish to have copies of the printed Appendix. Our references to the Appendix will appear as "a".

** The complaint, and proposed amendments to the complaint, are printed in Appendix E hereto, *infra*.

action alleged that the defendants had failed to pay into the B & O sinking fund a sum equal to all dividends declared and paid by the merged railroads as required by the indenture (19a, 77a and 78a). This sum, $81,000,000.00, would have paid more than three times over the principal and interest on all the outstanding bonds (20a, 21a). The fourth cause of action alleged that B & O deposited $10,000,00.00 to fund its retirement annuity plan before paying the bond interest, in violation of the indenture (20a, 75a-77a). The indenture sets forth what items of expense the company may pay in advance of bond interest in its definition of "Available Income", and funding a retirement plan is not included.

(A year and a half after this case was brought, accumulated interest from 1961 to 1967 was paid—this was in May 1968, on the eve of the decision of our appeal in the Second Circuit from the District Court's dismissal of our complaint (Appendix hereto, *infra,* p. 4a). This payment of interest arrears did not terminate the controversy as to acceleration of the principal of the bonds, for under the theory of the complaint (*supra*) the bonds have matured by reason of the several categories of default above summarized. Our further recitals and discusion, *infra,* are to be read as addressed to the claims for payment of principal.)

The defendant railroads filed answers raising substantially identical affirmative defenses:—(1) plaintiffs lacked standing to sue because under the indenture only holders of twenty-five per cent or more of the outstanding bonds may sue if the trustee after due demand has refused; (2) under preemptive Federal legislation railroad carriers may not merge or assume obligations without ICC approval which had not been sought or obtained in this case,

and the allegations of merger in fact being denied (25a-28a, 33a-35a). These two affirmative defenses were tested by the proceedings on the defendants' subsequent motion for summary judgment (48a *et seq.*) and plaintiffs' motion to strike the affirmative defenses (35a *et seq.*), extensive affidavits being submitted on these motions (37a-47a, 53a-108a). In plaintiffs' affidavits their basic contention that the defendant railroads had gone beyond the "control" authority given by the ICC and for practical purposes determinative here had merged in fact without having obtained express ICC merger authority, was supported by the following averment of acts of the railroads effecting a quite real integration of the two companies:—

These departments of each railroad were combined under one executive head: personnel and labor relations, operations, purchases and materials management, law, taxes, commercial development, public relations and advertising, finance, real estate, passenger services, trailer services, coal, corporate secretary, comptroller, treasurer, chief executive officer and president (16a). The defendants held themselves out to be "C & O-B & O Partnership" and represented to the world that because the said ". . . C & O and B & O is a partnership, the best brains and talents of both railroads had been welded into a new organization through mangement and development coordinations" (16a, 17a). C & O and B & O filed consolidated tax returns, and published consolidated financial statements and shareholders annual reports. The C & O owns at least 90% of the stock equity of the B & O(16a, 17a). The railroads have adopted the name "C & O/B & O" which they use on all their literature and publications; that name is used about 122 times in their 1965 annual report; Gregory S. Devine's title is "C & O/B & O Presi-

dent" (104a). The annual report of the two railroads is one document and is addressed to "Dear Shareholder". They publish one newspaper entitled, "Chessie/B & O News for the whole C & O and B & O Family" (104a). In addition to filing consolidated income tax returns, they file a statement of consolidated earnings, a statement of consolidated other capital and a statement of consolidated earnings, reinvested in the business. Both roads have consolidated stations, terminals, and offices. They have pooled freight train equipment and eliminated duplicating passenger service. In 1966 alone they coordinated activities in nine cities. Their time table is called "C & O Passenger Time Table B & O". The map in the time table is labeled "C & O/B & O Passenger Routes and Connections". Many of the C & C trains have been consolidated with the B & O trains and vice versa. They made two major appointments in 1966 to the office of Vice President, Industrial Development, C & O/B & O and Vice President of Trailer Services, C & O/B & O. In an apendix at the end of appellants' (petitioners here) brief in the Court of Appeals we have compiled what is believed to be a complete list of the joint officers and department heads and the transfer of officers or personnel between the two railroads. Said list was obtained from a petition dated April 4, 1967 submitted by the New York Central Railroad for reconsideration before the I.C.C. concerning the application of the C & O for control of additional railroad lines, under Finance Docket No. 23178. We urged below it was manifest from this list that C & O and B & O have effected a *de facto* merger of their two railroads and are operating them as one line.*

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* The list above referred to is printed, as said, as an Appendix at the end of our brief in the Court of Appeals (pp. 19-28). We are requesting the Clerk of that Court to transmit, and the Clerk of this Court to receive, certified copies of that brief.

Plaintiffs (petitioners here) also moved in the District Court for leave to amend the complaint by adding alternative causes of action, under 49 U.S.C. §§8 and 20(a)(11), alleging wrongful failure to obtain ICC permission for assumption of B & O's obligations and claiming recovery individually against additional named defendants as officers of the railroads (44a-47a, printed in Appendix E hereto, *infra*). The defendant railroads opposed our motion for leave so to amend the complaint (93a).

On the above pleadings and motions the matter stood for decision by the District Court on three issues, (1) the "no action" issue, (2) the triability of our allegations of a "merger in fact", and (3) our request for leave to amend by including claims against the railroad officers individually (as well as against the corporate defendants) for violation of §§8 and 20a(11) of 49 U.S.C.

Our position in the District Court on the "no action" issue was, (1) that even though we did not represent twenty-five per cent or more of the bondholders, the "no action" provision of the indenture was not controlling here because the face of the bond did not adequately import the indenture language*, and (2) that we had requested the trustee (Chase Manhattan Bank) to sue and were ourselves now entitled to sue because the trustee's failure to do so was unreasonable in view of the merger-in-fact conduct of the railroads and their acts and omissions pursuant thereto which were injurious to the bondholders' rights.

On the issue, as such, of our allegations of a merger-in-fact and consequent liability of both railroads on the

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* This contention of ours as to the language of the bond is not argued in this petition but is preserved as a possibly relevant item in the overall question of petitioners' federally protectible rights.

bonds, our position before the District Court, factually, is sufficiently indicated in our above description of the practical integration of the two railroads and their treatment of the bondholders. On the issue of law as to the triability of our allegations of a *de facto* merger, the question before the District Court boiled down to this: Was it dispositive against us as a matter of law that, notwithstanding the uncontradicted actualities of the C & O-B & O combination and their treatment of the bondholders*, the ICC had not authorized a "merger" or assumption of debts? Our position before the District Court on this ultimate question reflected the apparent *sui generis* nature of the peculiar "control" happenings of this particular railroad combination; that is, our presentation before the District Court perforce reflected the apparent uniqueness of the facts of this situation, and accordingly this case called upon the District Court to open its mind for consideration of a theory whose seemingly unprecedented character reflected the unprecedented facts of the aggrieving conduct of the defendant railroads.** In effect, our suit called upon the District Court to perceive that standards of justice in a Federal Court favor the fashioning of a remedy for the instant bondholders in light of the stark actualities of the C & O-B & O "control" integration, and that it is simplistic to deem this case governed solely by the action or non-action of the ICC.

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* This treatment of the bondholders, again, included payment of rich dividends to "C & O" stockholders, while B & O interest arrears accumulated, and continued failure to make B & O sinking fund payments on the assertion of lack of "available income" during the same years when C & O was declaring felicitous income indeed.

** Our presentation in this petition (see our "Reasons", *infra*) endeavors to expand substantially our presentation in the Courts below on the *sui generis* issues of law above mentioned.

On the issues of our motion for leave to amend the complaint by adding alternative claims against the corporate defendants and the railroad officers individually for placing the bondholders in the whip-saw plight of being confronted with the allegedly fatal lack of ICC action, our position before the District Court was that the statutes involved (49 U.S.C. §§8 and 20(a)(11)) should be construed to afford us such alternative relief (see further discussion under our "Reasons", *infra*).

The District Court, in granting summary judgment and denying leave to amend the complaint, ruled that as a matter of law we were barred by the "no action" provision of the indenture, and that in any event our contentions based on the theory of *de facto* merger failed to state a claim because it was "frivolous" for us so to contend in the face of the position which the ICC had taken in the C & O-B & O "control" proceedings. The District Court also ruled that our proposed amendments to the complaint failed to state a claim because we did not show that we had been hurt in *consequence of* any violation of §§8 and 20(a)(11) of 49 U.S.C. (Under our "Reasons", *infra*, we discuss the logical circularity of this branch of the District Court's reasoning). The District Court's opinion is printed in Appendix B hereto, *infra*.

The Court of Appeals affirmed on substantially the same reasoning as that of the District Court (Appendix A hereto, *infra*).

Additional pertinent facts concerning the C & O-B & O "control" proceedings before the ICC in 1962 are noted under our "Reasons", *infra*.

Reasons for Granting the Writ*

I.

In our immediately preceding footnote we stated that the constitutional formulations which we consider proper and necessary to include in this petition were not presented by us in the Courts below, but that we believe the constitutional issues are necessarily in the case and may be considered by this Court.

Indeed, it is hard to see how the issues litigated and decided in the Courts below can be ultimately judged without taking into consideration the constitutional perspectives—and the historical perspectives—alluded to in our Questions Presented.

The present petitioners, and the class of bondholders whom they represent, are bystander victims, as it were, of a convergence of several potent factors, namely, (1) the virtual haplessness, if we may so term it, of Congress' own efforts over half a century to devise an abiding

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* Our Questions Presented, as seen, embody constitutional themes which were not expressly formulated in the Courts below, but which seem to us necessarily in the case under the pleadings and in light of the issues as to the acts and authority of the ICC. It is familiar that where a question of statutory constitutionality "is inherently fundamental" the point may and indeed needs to be considered by an appellate court even if at the appellate court level itself the constitutional validity of the statute "is not assailed" and "the subject [is] passed without discussion by any of the parties." *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 294 U. S. 648, 667. We are not sure whether the present situation is one requiring apprisal to the Solicitor General that constitutional questions are raised, but to avoid fault in this we are serving the Solicitor General with this petition.

and satisfactory legislative policy to deal with the problem of railroad unifications*; (2) the sometimes (as instanced in the present C & O-B & O "control" situation) almost grotesque short-sightedness and all-around unwisdom of the ICC in administering that legislation**; (3) the downpouring upon the national railroad transportation scene, in just the past few years, of the flood of joint railroad merger activities, in which responsible critics have cried their dismay at the failure of the ICC to approach even remotely the achievement of the *sine qua non* task of making sure that the several joint merger processes bear some rational relation to each other and to the rest of the railroad system†; the specific injustice, latent in the intrinsically injustice-prone statutory distinction between "control" and "merger" (49 U.S.C. §5), which may strike helpless bystander investors in railroad securities when, as we claim has happened here, the financial managers of great corporate aggregations are unleashed by the ICC to "control" invested capital, including loaned

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* As remarked in Mr. Justice Clark's opinion, for the Court, in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, 386, "This Court has often pointed out that the national transportation policy 'is the product of a long history of trial and error by Congress * * *'. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 80 (1944)." The history of this legislation is summarized in *St. Joe Paper Co.* v. *Atlantic Coastline Railroad Co.,* 347 U. S. 298, 315 *et seq.* (Appendix).

** See, e.g., the concretely stated criticisms by Mr. Justice Douglas, dissenting, in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, 438 *et seq.;* and see, in the ICC decision concerning the instant C&O-B&O control proceedings, the dissenting opinion of Commissioner Tucker, Chesapeake & O. Ry. Co.—Control—Baltimore & R. Co., 371 I.C.C. 261, 293 *et seq.* (1962).

† See last preceding footnote.

capital, without being made sufficiently answerable for the fairness of their managerial choices in preferring one financial interest against another among those under their "control".

To a striking degree, the perspectives mentioned in the last preceding paragraph were envisaged by ICC Commissioner Tucker in his dissent in the 1962 C & O-B & O "control" proceeding (cited in our next-to-last preceding footnote—see 317 I. C. C. 261, at 293 *et seq.*). Commissioner Tucker's dissent emphasized above all his alarm that the C & O-B & O combination was being decided by the ICC piecemeal or on a case-by-case basis, instead of being considered and decided with the other then (1962) pending giant mergers of the eastern railroads (Penn-Central and N & W-Nickel Plate) (*id.*, 294-300, 329-332). Commissioner Tucker argued that it was impossible to say that this C & O-B & O "control" authorization by the ICC was "just a control case and that a decision on actual merger of the two roads will be made at some time in the future. As a practical matter, this is a permanent alignment of the two railroads, and the Commission is, in effect, being called upon to take its first step toward approval of a far-reaching alignment of the eastern railroad system" (*id.*, 296). Again, at *id.*, 298, Commissioner Tucker said, "In a narrow and literal sense, the transaction proposed is the control of the B & O by the C & O. What these parties actually propose, however, is to become one of three giant rail systems in the East."

That C & O and B & O in every realistic sense knew they were embarking upon a practical merger, and that the ICC chose to shut its eyes to these facts, was brought out with special vividness by Commissioner Tucker at pages 309-310 of his dissenting opinion, where he noted that B & O's own witnesses in the 1962 control proceeding

"stated many times that control was acceptable only as a step towards merger. The Maryland Port Authority similarly recognizes control as detrimental to the B & O, and supports this application only because a written understanding has been made to seek merger as soon as practicable." See also the ICC majority opinion, at *id.*, 280, 289-290, further describing the latter agreement. It appears that C & O "entered into an agreement and stipulation dated May 26, 1961, introduced as counsel's exhibit, with B & O and Maryland Port Authority, under the principal terms of which it was agreed (1) the period of stock control shall be no longer than necessary to permit merger of the C & O and B & O * * *. Maryland Port Authority and Baltimore Chamber of Commerce intervened in support of the application only as a necessary step to the accomplishment of a merger and stated that their support was conditioned upon full compliance by the railroads with the agreements and stipulations contained in the agreement" (*id.*, 289). The Maryland interveners also requested the ICC "that the terms of the agreement be included in our report as conditions to our approval of the transaction and that we reserve jurisdiction to reopen the proceedings for further hearing in the event that merger is unreasonably delayed" (*ibid.*). The ICC declined to include the latter condition, adducing its lack of power to take initiative in railroad mergers (*id.*, 290).

We note also that Commissioner Tucker, presenting substantial data, vigorously disagreed with the ICC majority's finding that B & O was in grave financial condition such as to justify the granting of the C & O application in the manner done (*id.*, 301-303); and he went further and found that the savings predicted from coordination under the C & O control would benefit C & O more than B & O (*id.*, 307, 309, 316).

We mention the above observations of Commissioner Tucker because we think they have an important bearing on the issues of the instant litigation—not because we are under any misimpression that this case involves a relitigating as such of the 1962 B & O-C & O ICC "control" proceeding. Commissioner Tucker's prophetic words are pertinent here because, putting it perhaps over-simplifiedly to begin with, we are contending in this case that the relief we seek is not foreclosed by the ICC's 1962 action, and that one important circumstance which favors our not being foreclosed by what ICC has done or not done, is that that Agency's 1962 C & O-B & O "control" decision is a very bad and very unwise decision.

Having worded our contentions provisionally in the deliberately over-simplified way just stated, let us restate the point in terms more appropriately addressed to this Court's certiorari jurisdiction: If it is said that we are foreclosed by the 1962 ICC decision, then we respectfully contend that that decision is a *constitutional nullity* for any such foreclosing purpose in this case; and further, if it be said that the 1962 ICC decision was within the statutory powers of the ICC, then we respectfully contend that the relevant statutory provisions are unconstitutional as here applied. The constitutional aggrievements which we assert are violation of due process of law (both procedural and substantive) and violation of the just compensation guarantee of the Fifth Amendment.

These constitutional contentions (whose precise impingement we further discuss *infra*) are to be evaluated, we moreover urge, against that entire larger setting of the historical and constitutional perspectives (*supra*), whose aggrieving convergence upon us needs to be discerned in order to have a full appreciation of the injustice and illegality to which petitioners presently stand subjected.

Petitioners realize, of course, that persons who invest capital in railroad carriers are subject to the financial regulatory powers of the ICC. E.g., *Denver and Rio Grande Western Railroad Co.* v. *United States,* 387 U. S. 485. However, it is also to be remembered that the anti-trust policy exception which Congress has created to allow railroad combinations is to "serve the national interest" i.e., that "Obviously not every merger or consolidation that may be agreed upon by private interests can pass the statutory test". *Penn Central and N&W Inclusion Cases,* 389 U. S. 486, ——, 19 L. Ed. 2d 723, at 735-736. In other words, the railroad merger statutes do not exist for the private welfare of railroad managerial groups. And this Court has long recognized that the statutory standards of "just and reasonable" and "consistent with the public interest" (49 U.S.C. §5) embrace concern for the rights of railroad creditors. E.g., *New England Divisions Case,* 264 U. S. 184, 189.

It seems axiomatic, then, that, so long as railroad bondholders continue to enjoy this recognition of their right to "just and reasonable" treatment under the railroad merger laws—and cf. the similar doctrinal theme recognized in *Denver and Rio Grande Western Railroad Co.* v. *United States, supra,* with reference to the ICC's financial regulatory powers under 49 U.S.C. §20(a)(2)—there can never be totally foreclosed, in regard to any specific claim of right by a railroad bondholder, access by the bondholder to some procedurally adequate ultimate judicial remedy, if only for the enforcement of his *statutory* rights, and *a fortiori* for the enforcement of his *constitutional* rights which the statutory standard of "just and reasonable" expresses. When a person puts his money into a railroad bond he does not subject himself to any despotic power of government. There always remains open the constitutional question of whether a particular im-

pingement of ICC power on a railroad bondholder is constitutional.

These latter themes, as we above suggested, may be taken as axiomatic. The existence of a substantive constitutional right in this respect is beyond debate. The rub comes, we appreciate, in deciding whether a particular procedural remedy is available for the enforcement of this substantive constitutional right of a railroad bondholder.

Our central point in this petition is that the Courts below did not adequately consider, and that they wrongly decided, this question of the proper procedural avenue in the present case, because those Courts approached the question too narrowly. As to the dispositive preoccupation of both of the Courts below with the "no action" provision we discuss this topic separately under our Reason III, *infra*. As to the conclusion reached by both of the Courts below that (in effect) the ICC had spoken and this ended the matter, we refer again to the considerations of historical and constitutional policy above mentioned and we submit further as follows:

In the Courts below the parties did not litigate any issue as to primary jurisdiction of the ICC. The District Court addressed itself to this subject *sua sponte* in its written opinion, in footnote 8 therof (Appendix B hereto, *infra*), stating that our claim "is really a collateral challenge to the I.C.C.'s approval of the transaction and acts upon which the complaint is based". One answer to this is that the main operative happenings to which the complaint refers occurred subsequent to the 1962 ICC determination. And that being so, would it accord with due process of law to remit petitioners now to some sort of application before the ICC in pursuit of the boons of that Agency's "primary jurisdiction"? The sheer prohibitive burden-

someness of the task to which petitioners would thus be put, a prodigous labor and expense for individuals so circumstanced as our petitioners, are enough to make this "remedy" unrealistic by any sensible standard of procedural due process. Besides, what would be the issues thus to be brought before the ICC by parties in the circumstances of these petitioners? That the two railroads should now be compelled to effectuate *de jure* the claimed *de facto* merger? As the ICC has itself already said in its 1962 decision herein (citing this Court's *St. Joe* decision, *supra*), it deems itself to have no power to initiate or force railroad mergers. This last, incidentally, is one of the more outré incidences of the applicable legislation upon the circumstances of the present case, i.e. ICC can straight-facedly approve a "control" which everyone knows is being undertaken only because it is part and parcel of a quite real merger dynamic, in fact the control-seeking applicant (C&O) has even agreed in writing to effect such merger "as soon as practicable", and yet one cannot have any hope that the ICC will ever take affirmative steps to enforce the merger even though such is overpoweringly indicated as necessary for the protection of creditors who are being treated by the "control" railroad virtually with contempt of their legitimate financial rights. This convergence of injurious impacts upon the bondholders puts them, the ICC, and the Constitution itself in an impasse of bounden helplessness to redress manifest injustice.

It respectfully seems to us that the procedural avenue which petitioners are pursuing in this case is the right one, and probably the only right one, for coping with the difficulties and anomalies above sketched. Our suit in the District Court did not call upon that Court to undertake an intricate transportation-economics study as to the merits of a C&O-B&O merger under the federal railroad

legislation. Our suit only asked the District Court to give us a trial on the reasonably finite factual issue of whether *in fact* C&O and B&O had behaved in such a way with each other and towards B&O's bondholders as to justify granting to the latter their common law and constitutionally guaranteed rights of property. The basic corpus of the *probatum* need for such a trial would not be forbiddingly large or complicated; its essential outlines were already delineated in the factual materials presented to the District Court on the motion proceedings (*supra*).

The procedural avenue which we have been pursuing in this case seems to us right for the further reason that it includes the proposed amendments to the complaint, adding alternative causes of action grounded on claims of violation of Sections 8 and 20(a)(11) of 49 U.S.C. These statutes are expressly directed to the affording of court remedies upon a showing of violation of a regulatory provision administered by the ICC; the statutes serve the very purpose of relieving the ICC (and parties) of the larger labors characteristically encountered in administrative proceedings in this difficult regulatory area.

And although both of the Courts below ruled that we did not qualify under Sections 8 and 20(a)(11), we submit that they were wrong. The Court of Appeals on this point adopted the reasoning of the District Court without further discussion. The District Court ruled that as to Section 20(a)(11) we were barred because we did not allege that we acquired void securities or that we acquired them *after* the alleged merger in fact, for value in good faith, and without notice that the alleged assumption via merger was void. This reading by the District Court of Section 20(a)(11) is supported by no au-

thority; and we submit that it does violence to the fair meaning and spirit of the statute. Our petitioners owned their bonds for several years before the happenings involved in this complaint. Is it conceivable that Congress intended to afford a remedy under Section 20(a)(11) to owners of securities made void before the victim acquired them, but not to owners whose securities are made void without their consent or knowledge *after* acquiring the securities? Such a reading of the statute would raise a most distressing question of denial of the equal protection of the laws.

The District Court also rejected the proposed amendments to the complaint for failure to show that the damages sought were sustained "in consequence of" a violation of the Interstate Commerce Act (49 U.S.C. §8). This branch of the District Court's reasoning (261 F. Supp. at 733-734; and see Appendix B hereto, *infra*) respectfully seems to us a mere exercise in specious ratiocination. The proposed amendments to the complaint (Appendix E hereto, *infra*), in each instance repeated the operative allegations of the original complaint as to merger in fact and damaging action to the bondholders, further alleged that the defendants had failed to apply to the ICC for authorization for C&O to assume the bond obligations of B&O *"in violation of the duty imposed upon them by law to so do"*, and further pleaded for alternative relief on this latter ground in the event recovery could not be had on the original complaint allegation of a merger in fact without more. Since C&O got its control authority in this case on a record drenched with the expectations and promises of merger as soon as practicable, is it not reasonable to plead, as we did in our proposed amended complaint, that C&O's failure to carry out its good faith duty for consummation of the formal "merging" of the debt structures of the two railroads

constituted a violation of the "law" meaning, obviously, the Interstate Commerce Act, at least *inter alia?* Where, then, is our failure, in the proposed amendments to the complaint, to plead effectively that the damages sought were "in consequence of" violation of the Interstate Commerce Act? And surely this was not a matter which should have been obliteratingly resolved against us in the setting of opponents' demand for summary judgment, where, as we contend, the District Court's mind was caught in a predilection towards concepts of some sort of theory of ICC res judicata, or preemption, or primary jurisdiction—a predilection which, as above urged, was unjustified on historical and constitutional grounds.

We have not heretofore in this petition addressed ourselves emphatically enough, perhaps, to one of the downright ruling realities of this case, namely, the reality of the power which actually was given to C&O under the 1962 ICC determination, and the ways in which C&O has used that power. Here we have one railroad, C&O, which has been permitted to acquire 90 percent of the stock of the "controlled" railroad, B&O. By the realities of the daily world, is there still in existence a "B&O" at all, for any meaningful purpose of the present litigation? The 90 per cent stockholder is the effective *controlling* reality, and not merely in the glazed-eyed contemplation of the government officials who "administer" the statutory "control" powers, or in the shrewd-masked-eyed contemplation of the very capable financial and legal gentlemen who administer the so-called railroad "control" in this or in other comparable situations. The 90 per cent stockholder, need it be said, decides *everything* that goes on in relation to the financial affairs of B&O; he is a *single, unified* 90 per cent stockholder, he does not have to consult or negotiate with other stockholder interests to be able to

speak with the plenary sovereign voice of a 90 per cent stockholder. He decides, need it be said, not only what dividends *C&O* shall pay, but also what dividends, interest payments, sinking fund payments, and what not payments or nonpayments, *B&O* shall make. Just in ordinary terms of the common law of principal and agent, or in terms of the common law of the "piercing of the corporate veil", C&O *is* B&O, for all significant purposes of concern in this law suit. In the face of this all-dominating reality of C&O's total power over this scene, can there be any constitutionally authentic merit in solemn reassurance to the present petitioners-bondholders that it is just perfectly fine to slam the doors of judicial relief in their faces because everything about the self-contained Federal statutory system of ICC plenary preemption in the field of railroad mergers and railroad securities is just perfectly fine? We used just now the term "self-contained" system in referring to the doctrine of ICC hegemony in these areas. The better term would be "closed system", so as to convey the odiousness of this kind of doctrinal thinking in our epistemology as lawyers. The advance of everything that has real value in our civilized legal order, indeed of everything that has real value in the whole highminded culture of Western man, owes nothing to the processes of self-delusion and servility of mind which are indispensible to the "closed system" forms of human consciousness and communication. It may sound strangely on the ear to be asked to listen to such philosophizings in a case evolving nothing more noble than the financial interests of a railroad bondholder. But those bondholder interests enjoy the protection of a noble Power, the Power of the United States Constitution. And the "closed system" of anti-thought and anti-constitutionalism against which we are here respectfully inveighing is a thwarting phenomenon indeed,

to the conscientious legal mind which happens to become obliged to grapple with that system, as counsel and this Court are finding themselves obliged to do in this moment. The "closed system" by which railroad applicants in conjunction with the ICC may utilize the "control" provisions as supposedly distinct from the "merger" provisions of the Interstate Commerce Act, for the perpetration of the kind of injustices complained of by petitioners in this case—the blithe substituting of a new debtor for an old one and with the new debtor seemingly obliged to do nothing more with respect to the creditor than occasionally to wave "hello" to him, from a safe distance—cryingly demands and deserves a whole *de novo* scrutiny by this Court, with specific reference to the issues of this case.

When one reads the earnest expressions of prophetic alarm which the capable and doughty Commissioner Tucker wrote in dissent in the 1962 ICC report approving C&O control over B&O, and when one reflects on the course of the joint railroad merger movement as it has crashed onward across this country's economic institutions and populated settlements in the few short intervening years, one is prompted, even at the risk of being charged with having read too much in the history of Western political thought, to exclaim that "a specter is haunting" America, the specter of headlong, *destructively* revolutionizing railroad combination—*destructive* precisely because it goes headlong, largely unguided by rational principles applied by disinterested monitors. Again, it may fall strangely upon the ear to hear these rather grandly stated themes from the mouths of the prosaic class called railroad bondholders. Petitioners willingly risk incurring the scorn of being thought overly philosophical or overly rhetorical. Shall we add that railroad bondholders, in

addition to having the image of the prosaic, also tend to be rather practical? The practical reality of this certiorari petition is that our best, real hope of pricking the constitiutional conscience of this Court for the granting of certiorari in this case resides in our bringing our prosaic bondholder-petitioners within the rubric of an immediately pressing and major constitutional concern of which this Court may feel impelled to take note at this time. This is one of those instances in human affairs where the practical motive blends well with the motive of high humanistic ideals. (A familiar historical precedent is the blending of the economic and the political-theory ideals of those of the propertied gentlemen of the era who initiated, and conducted the formative stages of, this Republic from about 1775 to about 1789.)

We therefore conclude our presentation under this Reason I by asking whether the Federal legislation and the ICC's administrative implementation thereof as applied to the facts of this case, whereby all depends on a nominalistic statutory "distinction" between "control" and "merger", with concomitant statutory provisions and administrative applications relating to regulation of railroad securities, should justly and constitutionally prevail to bring about the practical denigration to "second class" (or *non*-class) status of the property rights of our petitioners, in subjection to a newly-imposed creditor-debtor relationship of severe disadvantage to the new debtor, all without opportunity for normal judicial redress.

II.

Our Reason I, *supra,* asks the Court to grant this certiorari petition as affording a valuable occasion for reexamining statutory and constitutional questions of prime national importance in transportation policy, even though

such re-examination might affect current railroad consolidation procedures by restricting the present free play of some of the statutory and administrative (ICC) conceptual artificialities which have become established as standard operating procedures in this field. In thus inviting the Court to undertake a *de novo* scrutiny involving questioned legal fictions, we do not of course wish to be taken as losing sight for one moment of the quite concrete and substantial constitutional grounds which, we believe, favor certiorari relief for our petitioners. In this latter view of the case, we now call attention briefly to some decisions of this Court which are believed to give doctrinal support to this petition.

In *Allegheny Corporation* v. *Breswick & Co.*, 353 U. S. 151, 163-171, the Court's discussion may fairly be read as recognizing the unreality, in given circumstances, of the distinction between "control" and "merger"; and see the Court's disparagement of mere "labels", rather than "the nature of the changed relation" as the "crucial" factor "in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control'" (at p. 166).

In *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 282 U. S. 311, 325, 327, it was declared that the ICC's power to regulate the subject of railroad security "is not unlimited and may not be exercised arbitrarily * * *"; and that the power to regulate commerce "is not absolute" but is subject to the due process and just compensation provisions of the Constitution.*

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* These statements of the Court in the *Chicago, Milwaukee* case are not mere "Mossback" or anachronistic utterances, notwithstanding the intervening constitutional developments of the second half of the 1930's. For the purposes of the issues of the present case these stalwart declarations of the Court are strongly worthy of remembrance.

In *New York, Chicago & St. Louis Railroad Co.* v. *Frank,* 314 U. S. 360, and *Missouri-Kansas-Texas Railroad Co.* v. *Mars,* 278 U. S. 258, the Court made rulings the result of which was to give a flexible effect to the Federal legislation (49 U.S.C. §20(a)) conferring on the ICC the power to regulate railroad securities matters, these decision denoting, we submit, that this Court is not committed to so rigid a construction of the latter statute as would defeat justice and constitutional rights in any case.

In *County of Marin* v. *United States,* 356 U. S. 412, 416-418, the Court remarked upon the Congressional policy favoring ultimate railroad merger impingements. We refer to this case because we think it helps our theme that C&O and B&O's failure to fulfil their proclaimed merger intentions, resulting in injury to petitioners, is contrary to Congressional policy.

In *Schwabacher* v. *United States,* 334 U. S. 182, the Court disapproved an ICC determination, in a merger case, for failure of the ICC to consider and determine plenarily the claims of dissenting stockholders. The Court disagreed with the ICC's leaving these matters for ultimate possible determination under State law or by negotiation among the parties. In our case the *Schwabacher* approach of this Court could not have a realistic application. At the time of the 1962 ICC control proceedings in the C&O-B&O case, there was no occasion for bondholders of the class of these petitioners to assert a negative or questioning position, even had they been able to mount the effort and the resources needed for such a laborious enterprise. In that 1962 environment the air was filled with loving reassurances about a soon-forthcoming merger which would place C&O's excellent financial resources behind the B&O indebtedness. It was only post-1962, as

C&O went on to show its hand in "controlling" B&O, the bondholders like petitioners had their eyes opened and as above suggested (Reason I, *supra*), we cannot now, in realistic recognition of our sheer abilities of practical financial survival as such bondholders (not to say our due process rights), contemplate the ordeal of an ICC application, even if the law were not unalterably against our having any chance of inducing the ICC to enforce C&O's and B&O's merger-fulfilment obligations on a *de jure* basis (Reason I, supra).

III.

We have deferred, until this concluding portion of our Reasons, discussion of the "no action" issue—the issue arising out of the provision in the bond indenture that 25 per cent or more of the holders of the outstanding bonds are needed to cause the trustee to sue. Our defering of this topic as being of relative unimportance, apparently does not reflect the views of the Courts below. Both of those Courts, as we read the respective opinions, deemed our failure under the "no action" provision to be fatal.

Our position on this point is that, if we are right in our basic contention that (considering all the circumstances) C&O became liable to petitioners on B&O's bonds and is answerable to petitioners therefor in this suit, the bondholders' efforts to get the trustee to sue, successful or not, are of no concern, because for all the reasons hereinbefore argued, failure by the trustee to take up the bondholders' cause was unreasonable as a matter of law, and the bondholders may sue on their own.

Indeed, one of the most regrettable features of this litigation is that both of the Courts below saw fit to conclude, *through the mere summary procedures of Rule 56*

(summary judgment), that our claim of aggrievement for the railroads' mistreatment of the bondholders' rights is so lacking in merit as to justify concluding that the trustee was reasonable in not suing on our behalf, i.e., in adhering to the 25 per cent "no action" provision.

The conclusion of the Courts below that petitioners are barred by the "no action" provision may be supposed to rest, *arguendo*, on State law. We would therefore mention, *first*, that this Court has frequently declared that matters arising under the Interstate Commerce legislation pertinent hereto are federally preempted. E.g., *Seaboard Air Line Railroad Company* v. *Daniel*, 333 U. S. 118, 124-127; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12; *Northern Securities Co.* v. *United States*, 193 U. S. 197. The governing effect of State law, then, on the "no action" issue, is dubious at best.

Second, so far as our research discloses, all of the authorities cited by the Courts below and by our adversaries to justify the "no action" bar against us, were cases which in no remotest way involve any ICC consideration of any kind—what we have in mind here is that once the ICC factor is present, all of our previously herein argued points become relevant, *viz.*, the federal statutory and constitutional preemptive considerations take over so as to exclude any such narrow, technicalized bar as the "no action" provision of the bond indenture.

Third, as disclosed in the consolidated C&O-B&O annual reports, and in appendices printed in the briefs of the respondent railroads as appellees in the Court below, there is a very interesting picture of the status of the holdings of the B&O bonds over the past few years. It appears that, between them, at one time or another during these recent years (years which pertain to the issue of failure to satisfy the 25 per cent "no action" provision

of the bond indenture), the two railroads have themselves held from five million to six million dollars of the outstanding bonds of the instant issue, or perhaps more (through overlapping holding in point of time, or through other circumstances of overlapping holdings). The total of these outstanding bonds is approximately $22 million. Thus the two railroads, between them or singly, have, at all times pertinent hereto, been in a position to compel, as a practical matter, other bondholders to operate under severe handicap in any effort to assemble 25 per cent or more of the bonds in order to satisfy the "no action" provision. These facts as to the large percentage of the bonds held by the railroads were not expressly brought forth in the Courts below. We submit that these are facts which this Court may consider under its authority to make independent examination of the "constitutional facts". These facts are of constitutional import for all the reasons previously set forth in this petition. As we put it in our Questions Presented, *supra*, it is factually unrealistic, and legally and equitably wrong to enforce against petitioners the indenture-based technical 25 per cent "no action" provision in view of our adversaries' having been, during the pertinent times, colossus-astride the pathway that we were supposedly obliged to essay in order to comply with the "no action" provision.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 462—September Term, 1967.

(Argued May 16, 1968 Decided June 4, 1968.)

Docket No. 31110

IRVING D. FRIEDMAN and SYLVIA FRIEDMAN, on behalf of themselves and in a representative capacity on behalf of all other owners and/or holders of Baltimore and Ohio convertible 4½% income bonds due February 1st, 2010,

Plaintiffs-Appellants,

—against—

CHESAPEAKE AND OHIO RAILWAY COMPANY and BALTIMORE AND OHIO RAILROAD COMPANY,

Defendants-Appellees.

Before:

MOORE, HAYS and FEINBERG,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* dismissing plaintiffs-appellants' complaint.[1]

Affirmed.

1 The appeal, as stated in the notice of appeal, is from the judgment dismissing the complaint. However, the opinion below, which constitutes

CHARLES J. FINE, New York, N. Y., *for plaintiffs-appellants.*

CARL E. NEWTON, New York, N. Y. (Donovan Leisure Newton & Irvine, Robert F. Morten, R. Barry McComic, New York, N. Y., of counsel), *for the Chesapeake and Ohio Railway Company.*

EUGENE Z. DUBOSE, New York, N. Y. (Alexander & Green, Richard T. McDermott, New York, N. Y., of counsel), *for the Baltimore and Ohio Railroad Company.*

PER CURIAM:

This is an appeal from a judgment dismissing a complaint which alleges as a first cause of action that plaintiffs-appellants are the owners of $200,000 face value B & O 4½% convertible income bonds due February 1, 2010 ($22,000,000 principal amount outstanding); that the bonds were issued pursuant to an Indenture (Chase Manhattan Bank, Indenture Trustee); that the defendants Chesapeake and Ohio Railway Company (C & O) and Baltimore and Ohio Railroad Company (B & O) affected a "merger in fact" by combining various departments and operating services; that by reason thereof the obligations of the B & O "under the terms of the Indenture and Bonds" became the

an order, also denied plaintiffs' motion to amend the complaint and to change the title of the action to include directors, etc. The Rule 15(b) Statement specifies that "matters under appeal are the denial of plaintiffs' motion to add three additional alternative causes of action, additional parties defendant and to dismiss defendants' second affirmative defense as well as the granting of defendant Baltimore and Ohio Railroad Company's motion for summary judgment dismissing the complaint." Under the circumstances, the notice of appeal will be construed as embracing the denial of the motion to amend.

obligations of the C & O; that interest arrears in said B & O bonds through December 31, 1965 is $4,950,000; that in February 1966 C & O declared a $9,000,000 dividend on its common stock while there were arrears on the B & O bonds, thus making back interest payable under the Indenture and the Bonds; and that plaintiffs are entitled to seek recovery thereof in a class action.

A second cause of action alleges that such common stock dividend payment by C & O matured the B & O bonds; a third cause of action asserted a failure to make sinking fund payment as an event maturing the bonds; and a fourth cause of action alleged retirement annuity fund payments as an event of default.

As affirmative defenses, the defendants alleged first, exclusive jurisdiction in the Interstate Commerce Commission (ICC) to authorize mergers and assumption of the obligations of another carrier and second, failure to comply with the Indenture's requirement that the holders of 25% of principal amount of the Bonds must request the Trustee to bring suit.

Summary judgment was properly granted. First, the "no action" (unless a request by 25% of the bondholders) clause of the Indenture applies as a bar to the action. *Sutter* v. *Hudson Coal Co.*, 259 App. Div. 1053, 21 N. Y. S. 2d 40 (2d Dept. 1940); *Relmar Holding Co.* v. *Paramount Publix Corp.*, 147 Misc. 824, 263 N. Y. S. 776 (Sup. Ct. 1932).

Second, there is no issue of fact as to a merger. The ICC's approval of the use of joint facilities[2] was not approval of a merger as prescribed by law, 49 U. S. C. A.

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2 *Chesapeake & Ohio Railway Co.-Control-Baltimore & Ohio Railroad Co.*, 317 I. C. C. 261 (1962).

§5(2)(a)(4), or of the assumption by C & O of B & O's obligations. 49 U. S. C. A. §20a(2).

The motion to amend the complaint was properly denied. See opinion below. 261 F. Supp. 728 (S. D. N. Y. 1966).

In addition, appellants have conceded that on May 1, 1968 all accumulated interest from 1961 to 1967 inclusive was paid, thus removing any factual foundation for the first cause of action and rendering their claims to such interest moot.

Affirmed.

APPENDIX B
Opinion by MacMahon, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Appearances:

Charles J. Fine, New York, N. Y., for plaintiffs.

Donovan, Leisure, Newton & Irvine, New York, N. Y., for defendant Chesapeake and Ohio Railway Company (Carl E. Newton, Robert F. Morton, William P. Moyles, New York, N. Y., of counsel).

Alexander & Green, New York, N. Y., for defendant Baltimore and Ohio Railroad Company (Donald M. Dunn, Eugene Z. DuBose, New York, N. Y., of counsel).

MACMAHON, District Judge:

Plaintiffs move to strike a defense that they lack standing and for leave to serve an amended complaint. Defendant Baltimore and Ohio Railroad Company ("B&O") cross-moves for summary judgment.

The complaint purports to assert a class action on behalf of plaintiffs and all other holders of defendant B&O's convertible 4-1/2% income bonds, due February 1, 2010, and seeks to recover principal and interest on the bonds. The bonds were issued under an indenture which, *inter alia,* defines and conditions the rights of holders to sue.

The answers of both defendants assert an affirmative defense that plaintiffs lack standing to bring this action because they have failed to perform certain conditions precedent as required by the bonds and the indenture on which plaintiffs' claims are based.

Plaintiffs move under Rule 12(b) of the Federal Rules of Civil Procedure to strike the defense as insufficient

in law, and defendant B&O cross-moves under Rule 56(b) of the Federal Rules of Civil Procedure for summary judgment dismissing the complaint. There is no issue as to any material fact relating to the defense. The motions, thus, squarely raise the question of whether the defense is sufficient as a matter of law.

We note at the outset that the bonds are not due until February 1, 2010. Necessarily, therefore, an action to recover the principal does not lie unless the maturity date of the bonds has been accelerated by a completed event of default. The bonds, on their face, clearly refer to the indenture and expressly notify plaintiffs and all holders that "in case an event of default, as defined in the Indenture, shall occur, the principal of the Bonds may be declared, or may become, due and payable, in the manner and with the effect provided in the Indenture."[1] Plaintiffs are thus forced to rely on the indenture in order to accelerate the time of payment.

That plaintiffs have in fact based their claims on the indenture is abundantly clear on the face of the complaint which plainly invokes the aid of certain provisions of the trust indenture in order to accelerate the maturity of the bonds by the alleged occurrence of events of default. Thus, the complaint alleges four claims against both defendants, and the relief sought in all of them is based upon plaintiffs' allegation that there has been a "merger in fact" of the B&O and the Chesapeake and Ohio Railway Company ("C&O").

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[1] The quoted reference is definite and fairly places the bondholder on notice that his rights to sue *before the stated maturity date* are restricted and conditioned by the indenture. *Dunham v. Omaha & Council Bluffs St. Ry. Co.*, 106 F. 2d 1, 2 (2d Cir. 1939), cert. denied 309 U. S. 661 (1940). It is not merely a general statement of the rights of the holders, as in *Cunningham v. Pressed Steel Car Co.*, 238 App. Div. 624 (1st Dep't 1933), aff'd without opinion 263 N. Y. 671 (1934), a case involving bonds *already matured* upon which plaintiffs rely, nor was it one just to call attention to the character of the security, as in *Enoch v. Brandon*, 249 N. Y. 263 (1928). Moreover, this particular plaintiff has had knowledge of the indenture's provisions for at least ten years (Exhibit C to moving affidavit of Frederick W. Doolittle, Jr.).

Coupling their alleged merger in fact with alleged events of default specified in the indenture, plaintiffs claim that the maturity date of the bonds has been accelerated and that both railroads are now obligated to make payment on them. The alleged events of default upon which plaintiffs rely are the payment of dividends by C&O while there was nonpayment of interest on the B&O income bonds for the years 1961 through 1965, failure to make sinking fund payments, and payments into B&O's retirement annuity plans. The foregoing acts, according to the complaint, constitute "a subversion of plaintiffs' rights under the indenture and their bonds," causing arrears of interest to become immediately due and an acceleration of maturity of the principal of the B&O income bonds.

Assuming, *arguendo*, that the alleged events of default have in fact occurred, Article Eight of the indenture, nonetheless, invests the trustee under the indenture with all rights of action and provides that no action growing out of any provision of the B&O indenture may be instituted upon the bonds unless the trustee fails to act upon the request of 25% in principal amount of the outstanding bonds and the offer of adequate indemnity to the trustee.

As we have shown, plaintiffs must, and do, invoke the aid of certain provisions of the trust indenture to validate their claim. They must, therefore, plead and prove compliance with the requirements and performance of the conditions defined in the indenture as conditions precedent to the maintenance of this action.[2]

The complaint does not allege that the conditions precedent to suit, required by the trust indenture, have been met, and the fact that they have not been complied with is alleged in the challenged affirmative defense and is

[2] *Dunham v. Omaha & Council Bluffs St. Ry. Co., supra; Goldstein v. Childs Company*, 264 App. Div. 793 (2d Dep't 1942).

shown by undisputed affidavits supporting the motion for summary judgment. The complaint, therefore, fails to state a claim upon which relief can be granted, and there being no genuine issue of any material fact respecting the challenged affirmative defense, the motion for summary judgment must be granted,[3] unless there is merit to plaintiffs' remaining contentions which we will now discuss.

Plaintiffs argue that summary judgment is precluded because the Trust Indenture Act of 1939, 15 U. S. C. A. §77ppp(b), specifically prohibits any limitation on the right of a bondholder to institute suit for either principal or interest without the bondholders' consent. The short answer to this contention is that the bonds which are the subject of this suit were issued pursuant to the authority of the Interstate Commerce Commission, in accordance with §20a of the Interstate Commerce Act, 49 U. S. C. A. §20a,[4] and are expressly exempted from the provisions of the Trust Indenture Act, 15 U. S. C. A. §77ddd(a).[5] Section 3(a)(6) of the Securities Act of 1933, 15 U. S. C. A. §77c(a)(6), exempts "any security issued by a common or contract carrier, the issuance of

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[3] *Dunham v. Omaha & Council Bluffs St. Ry. Co., supra; Goldstein v. Childs Company, supra; Sutter v. Hudson Coal Company,* 259 App. Div. 1053 (2d Dep't 1940); *Watson v. Chicago, Rock Island & Pacific R. Co.,* 169 App. Div. 663 (1st Dep't 1915); *Schallitz v. Starrett Corporation,* 82 N. Y. S. 2d 89 (Sup. Ct. 1948); *Van Wezel v. McCord Radiator & Mfg. Co.,* 20 N. Y. S. 2d 91 (City Ct. N. Y. 1939); *Krause v. Lehigh Valley Coal Co.,* 172 Misc. 2 (Munic. Ct. N. Y. 1939).

[4] *Baltimore & O. R. Co. Debt Adjustment,* 261 I. C. C. 51 (1945); *Baltimore & O. R. Co. Securities,* 162 I. C. C. 169 (1930).

[5] 15 U.S.C.A. §77ddd(a) provides:

"The provisions of this subchapter [Trust Indenture Act of 1939] shall not apply to any of the following securities:

* * *

(4) any security exempted from the provisions of the Securities Act of 1933, by paragraphs (2)-(8), or (11) of section 77c(a) of this title [Securities Act of 1933] * * *."

Section 77c(a)(6) exempts "any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of Title 49 [Interstate Commerce Act]."

which is subject to the provisions of section 20a of Title 49 [Interstate Commerce Act]."[6]

Finally, plaintiffs contend that the challenged defense should not prevail because the trustee has unreasonably refused to sue. This is premised on plaintiffs' demand that the trustee take appropriate action on their claims that there has been a merger in fact and that the declaration and payment of a dividend by C&O constitutes an event of default.

There is no dispute that C&O has paid a dividend, but defendants vigorously deny that there has been a merger in fact or that such payment was a payment by B&O or in any way an event of default under the indenture. Plaintiffs assert that the trustee's failure to sue is so unreasonable that individual bondholders may sue despite the "no action" clause. Plaintiffs cannot so easily escape from the consequences of failing to perform the conditions precedent. The indenture requirement that bondholders may sue where the trustee fails to act, only if requested by the holders of 25% of the principal amount of the outstanding bonds and an offer of adequate indemnity to the trustee, is plainly reasonable.[7]

Plaintiffs' whole case is built upon the claim of a "merger in fact," predicated essentially on C&O's ownership of 90% of B&O's stock, the pooling of equipment, and the coordinated use of facilities and personnel. In

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[6] See 2 Loss, Securities Regulation 726 (2d ed. 1961); *Dabney v. Alleghany Corporation*, 164 F. Supp. 28, 30 (S.D.N.Y. 1958).

[7] "These restrictions place positive limitations on the rights of every bondholder which cannot at his option be ignored. They are both reasonable and salutary * * * [citations]. The reasons for the rule are stated by us in *Central States Life Ins. Co. v. Koplar Co., supra*, as follows [80 F. 2d 758]:

'The reason for the rule is not far to seek. If in a mortgage securing thousands of bonds every holder of a bond or bonds were free to sue at will for himself and for others similarly situated, the resulting harassment and litigation would be not only burdensome but intolerable.'" *Quirke v. St. Louis-SanFrancisco Ry. Co.*, 277 F. 2d 705, 709 (8th Cir.), cert. denied 363 U. S. 845 (1960).

approving C&O's acquisition of control of the B&O, the I.C.C. expressly recognized that the transaction was not a merger, and, noting that B&O's very existence was threatened unless its operating expenses were reduced and its earnings increased, found that:

> "Under affiliation C & O is willing and can provide the financial assistance needed to restore the B & O's properties to essential standards. This is not a temporary palliative but an effort of the railroads themselves to work out their long-range problems. Through the use of joint facilities and personnel and the pooling of equipment, substantial cost reductions and savings can be effected. Further, the legitimate interests of B & O's creditors and equity holders will be served by C & O control. As a result of the affiliation, B & O will eventually become a stronger railroad and the efficiency and economy of its operations will be increased. Strengthened as a result of the control, B & O's ability to meet adequately the needs of commerce and of the national defense will be enhanced. These take on added significance when we view the large industrial and population centers served by the B & O in 13 States and the District of Columbia." *Chesapeake & O. Ry. Co. Control,* 317 I.C.C. 261, 291 (1962).

Plaintiffs' claim of a "merger in fact" borders on the frivolous for it is predicated on semantics. Mere labels, however, cannot alter the fact that the I.C.C. has approved the very transaction and acts which form the basis of plaintiffs' claim.[8] Moreover, railroads may not

[8] Apparently because it is unnecessary to the motion, neither side raises any question concerning either primary jurisdiction of the I. C. C. or exhaustion of remedies. Although disguised in the semantics of a *de facto* merger, plaintiffs' claim is really a collateral challenge to the I. C. C.'s approval of the transaction and acts upon which the complaint is based. 49 U.S.C.A. §5(2)(4)(5)(7); *Whitney Nat'l Bank*

merge,[9] nor may one railroad assume the obligations of another without I.C.C. approval.[10] Surely, under the circumstances, the trustee's insistence on a request by the prescribed proportion of the bondholders and adequate indemnity before undertaking litigation of the complexity, magnitude, expense, and uncertainty inherent in plaintiffs' tenuous claim is clearly reasonable.

We hold, therefore, that the challenged affirmative defense is sufficient to bar the action as a matter of law.

We turn to plaintiffs' motion to amend their complaint to assert three additional alternative claims and to amend the title of the action as to the proposed first alternative claim to include the directors, officers, attorneys, and agents of the carriers as defendants.

All three alternative claims asserted in the proposed amended complaint are unique, if not specious. All are predicated on the hypothesis that plaintiffs prove upon a trial that there has been a merger in fact, which as a matter of law effected an assumption of B&O's bond obligations by C&O, but that plaintiffs failed to recover

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(Footnote continued)

v. Bank of New Orleans, 379 U. S. 411 (1965); *Gilbertville Trucking Co. v. United States*, 371 U. S. 115 (1962); *Far East Conference v. United States*, 342 U. S. 570 (1952); *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (S.D.N.Y. 1965); *Chicago South Shore & South Bend Railroad v. Monon Railroad*, 235 F. Supp. 984 (N.D. Ill. 1964) (and cases there cited).

New York, C. & St. L. R. Co. v. Frank, 314 U. S. 360 (1941), upon which plaintiffs rely, is not only distinguishable but gives controlling significance to the I. C. C.'s views. That case involved long recognition and acceptance by the I. C. C. of a *de jure* consolidation under a New York statute which provided that all debts of the constituent companies "shall thenceforth attach to such new * * * corporation, and be enforceable against it and its property to the same extent as if incurred or contracted by it." N. Y. Railroad Law §143. Failure to obtain explicit I. C. C. approval for the consolidation was, therefore, no defense to an action on the securities.

[9] 49 U.S.C.A. §§5, 5(2)(a), 5(4).

[10] 49 U.S.C.A. §20a(2). "It shall be unlawful for any carrier * * * to assume any obligation * * * in respect of the securities of any other person, natural or artificial * * * unless and until * * * the commission by order authorizes such * * * assumption."

on their original complaint because such an assumption is unlawful and void since it was not authorized by the I.C.C. Thus, the first claim seeks to visit liability upon the directors, etc. and the carriers on the theory that the directors, etc. are jointly and severally liable with the carriers for principal and interest on the bonds under §20a(11) of the Interstate Commerce Act for causing a merger in fact which effected a void assumption of B&O's bond obligations by C&O because it was not authorized by the I.C.C. as required by 49 U.S.C.A. §20a(2). The proposed second and third alternative claims seek the same recovery plus counsel fees from B&O and C&O under 49 U.S.C.A. §8 for a violation of the Interstate Commerce Act by reason of C&O's assumption of B&O's bond obligations via the merger in fact without obtaining formal approval of the I.C.C., as required by 49 U.S.C.A. §20a(2).

Section 20a(11) provides, in substance, that any security issued or assumed without, or contrary to, the authorization of the Commission shall be void. It makes the carriers, directors, and officers who participate in such unauthorized issue or assumption liable for the damage sustained by any person who acquired the void security "for value and in good faith and without notice that the issue or assumption is void."[11]

Plaintiffs' proposed first additional claim does not allege that plaintiffs acquired void securities, nor does it allege that plaintiffs acquired their securities *after* the alleged merger in fact, for value, in good faith, and without notice that the alleged assumption via merger was void. Thus, there is no allegation of an essential element required under §20a(11) of the Act—the good faith purchase of B&O's income bonds in reliance upon the credit of the alleged merged corporation. Plaintiffs, thus,

[11] 49 U.S.C.A. §20a(11); *M-K-T R. Co. v. Mars*, 278 U. S. 258, 260 (1929).

fail to allege facts showing that a violation of the Act was the proximate cause of the damages sought. The proposed first alternative claim, therefore, fails to allege a claim upon which relief can be granted. It necessarily follows that no claim is asserted against the proposed individual defendants under §20a(11) of the Act.

Section 8 of the Interstate Commerce Act provides, in substance, that any carrier which violates the Interstate Commerce Act by acts of commission or omission "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation * * * together with a reasonable counsel or attorney's fee * * *."

Assuming, despite I.C.C. approval of the challenged transaction and acts, that there has been a *de facto* merger, that C&O thereby assumed B&O's debt obligations, and that the carriers violated 49 U.S.C.A. §§5 and 20a(2) of the Act by failing to obtain I.C.C. approval, the proposed second and third alternative claims are still insufficient. It must appear that the damages sought—failure to recover interest and principal—arise from the violation of some provision of the Act itself.[12]

The proposed amended complaint alleges no facts showing that the damages sought are causally related to the alleged violations. Surely, quite apart from whether we may second guess the I.C.C.'s approval of the joint activities of these carriers,[13] we cannot speculate what the I.C.C. might do if asked to approve a *de jure* merger or assumption.[14] Nor can we guess what affect

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[12] *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, 408-409 (1942); *Penn. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 203 (1913); *Arnold v. Louisville & Nashville R. Co.*, 180 F. Supp. 429, 434 (M.D. Tenn. 1960), aff'd *sub. nom. Batts v. Louisville & Nashville R. Co.*, 316 F. 2d 22 (6th Cir. 1963).

[13] *N. Y. Dock Ry. v. Penn. R. Co.*, 1 F. Supp. 20, 21 (E.D. Pa. 1932), aff'd 62 F. 2d 1010 (3rd Cir.), cert. denied 289 U. S. 750 (1933).

[14] *Goldsmith v. St. Louis-San Francisco Ry. Co.*, 201 F. Supp. 867, 870 (W.D.N.C. 1962).

approval or disapproval would have on the payment of interest or principal on the bonds. Nor can we perceive any remote connection, much less causal relationship, between alleged violation of the Act and plaintiffs' failure to recover interest or principal under their original complaint. On the contrary, we dismiss the original complaint because plaintiffs have no standing to sue, not because they have acquired void obligations or because C&O assumed B&O's bond obligations contrary to law. Giving the proposed amended complaint the most favorable inferences to be drawn, and even assuming, contrary to the provisions and intent of the indenture, that plaintiffs have standing to sue for the claims asserted in the proposed amended complaint, the proffered pleading contains nothing to show that plaintiffs have suffered any injury or sustained damages *in consequence* of any violation of the Interstate Commerce Act, as the statute requires.

Although amendments are freely allowed under Rule 15(a) of the Federal Rules of Civil Procedure, they are not allowed where, as here, a party seeks to assert a claim that lacks merit.[15]

Accordingly, plaintiffs' motion to strike the second affirmative defense asserted by both defendants is denied. The cross-motion by B&O for summary judgment is granted in favor of both defendants. Plaintiffs' motion to amend its complaint and to change the title of the action to include the directors, etc. is likewise denied. There being no just reason for delay, the Clerk of the Court is hereby directed to enter judgment in favor of the defendants.

It is so ordered. No further order is necessary.

Dated: New York, N. Y., December 8, 1966

LLOYD F. MacMAHON
United States District Judge

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[15] *Johnson v. Partrederiet Brovigtank*, 202 F. Supp. 859, 867 (S.D. N.Y. 1962).

APPENDIX C

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of June, one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,

Circuit Judges.

IRVING D. FRIEDMAN, and SYLVIA FRIEDMAN on behalf of themselves and in a representative capacity on behalf of all other owners and/or holders of Baltimore and Ohio convertible 4½% income bonds due February 1st, 2010,

Plaintiffs-Appellants,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY and BALTIMORE AND OHIO RAILROAD COMPANY,

Defendants-Appellees.

Appendix C

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX D

Statutes Involved

49 U.S.C. § 5. Combinations and consolidations of carriers

* * *

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties therefore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or

person seeking authority therefore shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Appendix D

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

* * *

Control effected by other than prescribed method

(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any

transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however, such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effecuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such

transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

Affiliation with a carrier defined

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization of operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

Investigation by Commission of effectuation of control by non-prescribed methods

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require each person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section any penalty pro-

vision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

Jurisdiction of injunctions, etc., against violations of section or orders

(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

Supplimental orders by Commission

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

* * *

Plenary nature of authority under section

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such

corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carrier of other corporations and their officers and employes and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Separability clause

(12) If any provision of the foregoing paragraphs of this section or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs and the application of such provision to any other person or circumstances, shall not be affected thereby.

Appendix D

49 U.S.C. § 8

§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 104, Pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

49 U.S.C. § 20a (2)

§ 20a. Securities of carriers; issuance, etc.

* * *

Issuance of securities; assumption of obligations; authorization

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier

corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption; (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose; *Provided,* That nothing in this section is to be construed as applying to securities issued or obligations or liabilities assumed by the United States or any instrumentality thereof, or by the District of Columbia or any instrumentality thereof, or by any State of the United States, or by any political subdivision or municipal corporation of any State, or by any instrumentality of one or more States, political subdivisions thereof or municipal corporations. As amended July 24, 1965, Pub. L. 89-86, §1, 79 Stat. 263.

* * *

49 U.S.C. § 20a (11)

Securities issued contrary to law void; effect; penalty

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such

authorization therefor having first been obtained, or if issued or assumed contrary to any term of condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney, or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the commission's

order or orders in the premises, or any application not authorized by the commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

APPENDIX E

Complaint and Proposed Amendments to Complaint

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Plaintiffs, by their attorney, Charles J. Fine, complaining of the defendants, respectfully show and allege:

AS AND FOR A FIRST CAUSE OF ACTION

First: Plaintiffs Irving D. Friedman and Sylvia Friedman are citizens and residents of the City and State of New York.

Second: Defendant Chesapeake and Ohio Railway Company (hereinafter "C&O") is a corporation organized and existing under and by virtue of the laws of the states of Virginia and West Virginia, having its principal office for the transaction of its business in the state of Ohio.

Third: Defendant Baltimore and Ohio Railroad Company (hereinafter "B&O") is a corporation organized and existing under and by virtue of the laws of the states of Maryland and Virginia, having its principal office for the transaction of its business in the state of Maryland.

Fourth: That the matter in controversy in this action exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

Appendix E

Fifth: That the plaintiffs are owners or holders of 4½% cumulative convertible income bonds due February 1st, 2010, originally issued by B&O, of which there is presently outstading Twenty-Two Million ($22,000,000.00) Dollars in principal amount.

Sixth: Plaintiffs Irving D. Friedman and Sylvia Friedman are owners of said bonds hereinabove referred to in Paragraph "Fifth" in the principal amount of Two Hundred Thousand ($200,000.00) Dollars.

Seventh: That said bonds were issued pursuant to the terms of an Indenture made for the benefit of the bondholders with the Chase Manhattan Bank as Indenture Trustee.

Eighth: That the persons constituting the holders of said bonds are a class so numerous as to make it impracticable to bring them all before the court. Plaintiffs Irving D. Friedman's and Sylvia Friedman's representation of all of said bondholders will fairly insure the adequate representation of al lof said bondholders because the terms of the Indenture and the bond are identical. The character of the rights sought to be enforced by plaintiffs is several for all members of said class of bondholders, and there are common questions of law and fact effecting said several rights and a common relief is sought.

Ninth: That commencing prior to January 1st, 1966, the defendants C&O and B&O affected a merger in fact with each other by committing the following acts and the following course of conduct:

(a) By combining the following departments of each corporation under one executive head for each depart-

ment: personnel and labor relations, operations, purchases and materials management, law, taxes, commercial development, planning, public relations and advertising, finance, real estate, passenger services, trailer services, coal, corporate secretary, comptroller, treasurer, chief excutive officer and president.

(b) By both of said defendants holding themselves out to be a "C&O-B&O Partnership" and representing to the world that because the said "* * * C&O-B&O is a partnership, the best brains and talents of both railroads have been welded into a new organization through management and department coordinations".

(c) By the said C&O-B&O filing consolidated tax returns, publishing consolidated financial statements and consolidated shareholders annual reports.

(d) By the C&O owning at least a 90% stock equity in the B&O.

(e) By the C&O-B&O conducting their respective railroad business as a single network and enterprise.

(f) By committing other and further acts and courses of conduct.

Tenth: That by reason of the aforesaid merger in fact, the obligations of the B&O under the terms of the Indenture and Bonds have become the obligations of the C&O as well.

Eleventh: That interest on said bonds is cumulative at the rate of 4½% per annum, and no interest has been paid for the years 1961 through 1965, inclusive. The unpaid arrears of interest is $990,000.00 for each of said years and the total through December 31, 1965 is $4,950,000.00.

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Twelfth: That demand has been duly made upon both defendants to make payment of said arrears of interest and said demand has been refused.

Thirteenth: Demand has been duly made upon the Indenture Trustee, the Chase Manhattan Bank, to take appropriate action in the premises by reason of the failure of said defendants to make said payments of interest and said demand has been refused.

Fourteenth: That on or about the 21st day of February, 1966, defendant C&O declared a dividend totalling $9,000,000.00 on its common stock and paid said dividend on or about March 21st, 1966.

Fifteenth: The declaration and payment of said dividend by the C&O, while it owes arrears and interest on the bonds, as aforesaid, by reason of its merger in fact with B&O, is contrary to law and a subversion of plaintiffs' rights under the Indenture and their bonds.

Sixteenth: That said declaration and payment of dividends makes said arrears of interest immediately due and payable.

Seventeeth: That by reason of the aforesaid, defendants are indebted to plaintiffs Irving D. Friedman and Sylvia Friedman in the sum of $45,000.00 for arrears of interest on the bonds owned by them, and are indebted to all the other owners or holders of said bonds in the sum of $4,905,000.00 for said arrears of interest on their bonds.

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AS AND FOR A SECOND CAUSE OF ACTION

Eighteenth: Plaintiffs repeat and reallege each and every allegation contained in Paragraphs of the complaint numbered "First" through "Sixteenth" with the same force and effect as if they were set forth at length herein.

Nineteenth: That the declaration and payment of the common stock dividend as hereinabove set forth, while there are outstanding arrears of interest on the bonds, as aforesaid, is contrary to law and a subversion of plaintiffs' rights under the Indenture and the bonds and said declaration and payment of dividend accelerates the maturity and payable dates of the principal and interest of said bonds, making same immediately due and payable.

Twentieth: That by reason of the aforesaid, defendants are indebted to plaintiffs Irving D. Friedman and Sylvia Friedman in the sum of $200,000.00 for the principal sum of said bonds owned by them and an additional $45,000.00 in interest; and are indebted to all other owners or holders of said bonds in the sum of $21,800,000.00 in the principal sum of said bonds owned or held by them and an additional $4,725,000.00 in interest.

AS AND FOR A THIRD CAUSE OF ACTION

Twenty-First: Plaintiffs repeat and reallege each and every allegation contained in Paragraphs of the complaint numbered "First" through "Thirteenth" with the same force and effect as if they were set forth at length herein.

Twenty-Second: That the Indenture and bonds require the obligor to pay into a sinking fund an amount equal

to any dividend declared so long as annual fixed charges exceed $20,000,000.00.

Twenty-Third: That the annual fixed charges of the merged C&O-B&O exceeded $20,000,000.00 in the years 1964 1965 and 1966.

Twenty-Fourth: The merged defendants declared and paid divedends of $36,000,000.00 in 1964, $36,000,000.00 in 1965, and $9,000,000.00 to date in 1966, for a total of $81,000,000.00.

Twenty-Fifth: Defendants were required, under the terms of said Indenture and bonds, to pay into the sinking fund a total of $81,000,000.00 for 1964, 1965 and to date for 1966.

Twenty-Sixth: The defendants have failed and refused to make said sinking fund payments, although demand has been duly made.

Twenty-Seventh: That by reason of the failure of the defendants to make the required sinking fund payments, as aforesaid, all of the bonds have matured in the total sum of $22,000,000.00 of principal and $4,950,000.00 of interest.

AS AND FOR A FOURTH CAUSE OF ACTION

Twenty-Eighth: Plaintiffs repeat and reallege each and every allegation contained in Paragraphs of the complaint numbered "First" through "Thirteenth" with the same force and effect as if they were set forth at length herein.

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Twenty-Ninth: That the Indenture and bond prohibit any deposit to fund a retirement annuity plan while there are outstanding arrears of interest.

Thirtieth: That in the years 1964 and 1965, the defendant B&O of the merged C&O-B&O deposited $10,000,000.00 to fund its retirement annuity plans.

Thirty-First: That said deposit was in violation of the priorities of the bondholders, as aforesaid.

Thirty-Second: That by reason of the aforesaid, all of the bonds have matured in the total sum of $22,000,000.00 of principal and $4,950,000.00 of interest.

WHEREFORE, plaintiffs demand judgment against the defendants, as follows:

(a) In the sum of $45,000.00 on behalf of plaintiffs Irving D. Friedman and Sylvia Friedman, and $4,950,000.00 on behalf of all other bondholders under the first cause of action:

(b) In the sum of $245,000 on behalf of plaintiffs Irving D. Friedman and Sylvia Friedman, and $26,525,000.00 on behalf of all other bondholders under the second, third and fourth causes of action;

(c) The costs, interest and disbursements of this action.

/s/ CHARLES J. FINE
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Appendix E

Proposed Amendments to Complaint

Proposed Amended Title.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

IRVING D. FRIEDMAN and SYLVIA FRIEDMAN, on behalf of themselves and in a representative capacity on behalf of all other owners and/or holders of Baltimore and Ohio convertible 4½% income bonds due February 1st, 2010,

Plaintiffs,

against

CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILWAY COMPANY, WALTER J. TUOHY, GREGORY S. DEVINE, JOHN D. BIGGERS, CYRUS S. EATON, MILTON S. EISENHOWLR, CHARLES S. GARLAND, EDMUND L. GRIMES, JOHN E. KUSIK, JOHN E. MOTZ, JAMES PARKER NOLAN, HOWARD E. SIMPSON, ARTHUR W. STEUDEL, ROBERT J. BULKLEY, BARNUM L. COLTON, CYRUS S. EATON, JR., ROGER H. FERGER, M. S. FOTHERINGHAM, ERWIN H. WILL, FAY A. LEFEVRE, HEWITT BIAETT, OWEN CLARKE, C. VERNON COWAN, JAMES E. DOYLE, WILLIAM ECK, KENNETH H. EKIN, JOHN P. CANLEY, WALTER M. HAENSSEL, CHARLES HENRY, JR., ROBERT C. MCGOWAN, HOWARD SKIDMORE, HAYS T. WATKINS, JR., WILLIAM R. ALTHANS, M. C. MULLIGAN, PAUL H. REISTRUP, E. W. WRIGHT, E. TRUMAN WRIGHT, T. HOWARD KEELOR, JOHN T. FORD, L. C. ROIG, JR., AUGUST W. SCHELL and EDWARD P. SNYDER,

Defendants.

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Proposed Additional Causes of Action

UNITED STATES DISTRICT COURT,

PROPOSED FIRST ADDITIONAL ALTERNATIVE CAUSE OF ACTION AGAINST ALL OF THE DEFENDANTS

Thirty-Third: Plaintiffs repeat and reallege each and every allegation contained in paragraphs of the complaint numbered "First" through "Thirteenth" with the same force and effect as if they were set forth at length herein.

Thirty-Fourth: That all of the said individual defendants above named are directors, officers, attorneys or agents of either C&O or B&O, or both, and have been such during the years 1964 or 1965 or 1966.

Thirty-Fifth: That all of the defendants herein acting jointly and severally, by their acts and under their direction, caused and affected the merger in fact, as more particularly set forth in paragraph "Ninth" of the complaint.

Thirty-Sixth: That said defendants and each of them have failed and refused to make application to the Interstate Commerce Commission for an order, authorizing C&C to assume the bond obligations of B&O, in violation of the duty imposed upon them by law to so do.

Thirty-Seventh: That if the plaintiffs do not recover either the interest on said bonds, as demanded in the first cause of action, or the principal of said bonds, as demanded in the second cause of action, or both, by reason of any or all of the defendants' failure to obtain formal permission from the Interstate Commerce Commission for the C&O to assume the bond obligations of the B&O, then

in that event, plaintiffs demand judgment against all of the defendants both jointly and severally, for whatever sums have not been so recovered, pursuant to Title 49 U. S. C. Section 20 (a) (11).

PROPOSED SECOND ADDITIONAL ALTERNATIVE CAUSE OF ACTION AGAINST THE CORPORATE DEFENDANTS

Thirty-Eighth: Plaintiffs repeat and reallege each and every allegation contained in Paragraphs of the complaint numbered "First" through "Thirteenth", "Thirty-Fifth" and "Thirty-Sixth", inclusive, with the same force and effect as if they were set forth at length herein.

Thirty-Ninth: That if the plaintiffs do not recover either the interest on said bonds, as demanded in the first cause of action, or the principal of said bonds, as demanded in the second cause of action, or both, by reason of the corporate defendants' failure to obtain formal permission from the Interstate Commerce Commission for the C&O to assume the bond obligations of the B&O, then in that event, plaintiffs demand judgment against said corporate defendants, both jointly and severally, for whatever sums have not been so recovered, pursuant to Title 49 U. S. C. Section 8.

PROPOSED THIRD ADDITIONAL ALTERNATIVE CAUSE OF ACTION AGAINST THE CORPORATE DEFENDANTS

Fortieth: Plaintiffs repeat and reallege each and every allegation contained in paragraphs of the complaint numbered "First" through "Thirteenth", "Thirty-Fifth", "Thirty-Sixth" and "Thirty-Ninth", inclusive, with the same force and effect as if they were set forth at length herein.

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Forty-first: That plaintiffs demand from the corporate defendants reasonable counsel and attorneys fees, the amount of which to be fixed by the Court, and to be taxed and collected as part of the costs in this case, pursuant to Title 49 U. S. C. Section 8.

WHEREFORE, plaintiffs demand judgment as follows:
Against the corporate defendants:

(a) In the sum of $45,000.00 on behalf of plaintiffs Irving D. Friedman and Sylvia Friedman, and $4,905,000.00 on behalf of all other bondholders under the first cause of action;

(b) In the sum of $245,000.00 on behalf of plaintiffs Irving D. Friedman and Sylvia Friedman, and $26,525,000.00 on behalf of all other bondholders under the second, third and fourth causes of action;

(c) For a sum equal to the reasonable counsel and attorneys fees to be fixed by the Court and which are to be taxed and collected as part of the costs in this case, pursuant to Title 49 U. S. C. Section 8;

Against all of the defendants:

(d) For whatever sums hereinabove demanded which are not recovered by reason of the defendants' failure to apply for Interstate Commerce Commission approval for the C&O to assume the obligations of the B&O; and

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(e) The costs, interest and disbursements of this action.

/s/ CHARLES J. FINE
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